

Key Issues in Special Education Law: Present and Future

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1. Response to Intervention (RTI)

- present:
 - specific to SLD identification under IDEA
 - largely limited to state special ed laws, not court decisions
- future:
 - move to NCLB and extended generically beyond SLD?
 - ripening of predicted litigation?

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2. Eligibility Issues

- present:
 - identification of ED
 - overall emphasis on prong 2
 - confusing overlap with “child find”
- future:
 - evolution of “child find”
 - definition of “special education”

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3. Parental Consent

- present:
 - absolute (i.e., unilateral), including revocation, for initial services
- future:
 - confusing fall-back to § 504
 - continuing increase in state voucher-type sp. ed. laws

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4. FAPE Litigation: Autism

- present:
 - approximately half of FAPE court decisions – “disproportionality”
 - breaking the methodology barrier
- future:
 - maturational mitigation?

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5. FAPE Litigation: Parental Participation

- present:
 - IDEA 2004 procedural-violations exception to two-part test?
 - frequent claims with limited results (e.g., pre-determination)
- future:
 - increasing judicial

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6. FAPE Litigation: Elevation of Substantive Standard?

- present:
 - relaxed approach to qualified requirement for peer-reviewed research (PRR)
 - limited use of NCLB test results
- future:
 - outcomes approach: OSEP's new Results Driven

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7. FAPE Litigation: The Implementation Issue

- present:
 - predominant adjudicative standard of substantial and material, not 100%
- future:
 - continuing alternative standard for SEA enforcement?

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8. FAPE Litigation: Bullying

- present:
 - recent recognition with differentiation (Dear Colleague letter (OSEP 2012); *T.K. v. NYC Dep't of Educ.* – S.D.N.Y. 2014))
- future:
 - increasing claims with limited success and § 504 alternative (not state anti-bullying laws)

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N.B. FAPE Litigation: Bullying

T.K. v. NYC Dep't of Educ. (S.D.N.Y. 2014)

- where there is a legitimate concern that bullying will severely restrict a disabled student's educational opportunities, the IEP team must consider evidence of bullying in developing an appropriate IEP
- where there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities, the IEP must include an anti-bullying program
- if a school district purports to address bullying in an IEP, it must do so in terms comprehensible to lay parents

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9. Increased Use of § 504/ADA

- present:
 - mostly on behalf of "double-covered" students
 - dangers of "consolation prize" (e.g., concussions)
 - district-friendly liability standard
- future:
 - limited differential – e.g., *T.M.*
 - stabilized increase for "504-only" students resulting from ADAAA?
 - settling the substantive standard?

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10. Restraint and Seclusion

- present:
 - proposed federal legislation but mostly increased state laws
 - largely unsuccessful litigation
- future:
 - part of reauthorized NCLB or IDEA?

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11. Other Legislative Changes?

- present:
 - *Schaffer v. Weast* (2005) – B/P
 - *Arlington Central* (2006) – expert fees
- future:
 - likely limited to state laws re B/P in the short run

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12. Litigation Remedies

- present:
 - tuition reimbursement – e.g., residential-placement test
- future:
 - compensatory education (e.g., interaction, calculation, **limitations period**, and implementation issues)
 - standard for money damages under § 504? FAPE denial too?

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13. Other Litigation Issues?

- not present, but possibly future:
 - “twice exceptional” students
 - ELL students
 - assistive technology
 - transition services
 - disciplinary changes in placement
 - reverse attorneys’ fees

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14. Dispute Resolution

- present:
 - frequency: “two worlds”
 - outcomes: perception of bias
 - process: legalization
 - emphasis: “alternatives” (filings v. adjudications)
- future:
 - increased use of complaint resolution systems (SEA and OCR)

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15. Concluding Caveat

- law:
 - minimum requirements
 - risk management
- lore:
 - misconceptions of law
 - distinctive role of “best practice” norms (e.g., FBAs/BIPs)

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